

In the September 10, 2012, Award, ALJ Barnes determined that as a result of her October 7, 2009, accident, claimant sustained a whole body injury resulting in a 12.5 percent whole body functional impairment, which was an average of the ratings of Drs. Pedro A. Murati and Peter V. Bieri. The ALJ found claimant failed to prove a task

loss. Averaging the 0 percent task loss with claimant's 100 percent wage loss, ALJ Barnes awarded claimant a 50 percent work disability.

Respondent contends claimant sustained an injury to her right foot only and that her functional impairment for that injury is 3 percent as indicated by Dr. Bieri. Respondent argues claimant's back complaints are not causally related to her October 7, 2009, work accident. Respondent, in the alternative, maintains the Board should adopt the opinions of Dr. Sandra Barrett that claimant sustained no functional impairment and no permanent restrictions from the alleged back injury. Respondent argues that because Dr. Barrett gave claimant no restrictions, claimant has no task loss and no work disability.

Claimant contends her back injury is work related and resulted in a permanent functional impairment. Claimant asserts she is entitled to a work disability award based upon a 91.7 percent task loss and a 100 percent wage loss for a 95.85 percent work disability. If the Board finds claimant did not sustain a task loss, claimant argues she is still entitled to a 50 percent work disability (based upon a 0 percent task loss and a 100 percent wage loss) as K.S.A. 44-510e does not prohibit a work disability if there is no task loss.

The issues before the Board on this appeal are:

1. Did claimant as a result of her October 7, 2009, work-related accident sustain a back injury or a right foot injury only?

2. If claimant's injury is limited to her right foot, what is the functional impairment for the right foot injury?

3. If claimant sustained a back injury as the result of her October 7, 2009, work-related accident,

A. Did claimant sustain a permanent functional impairment?

B. If so, what is claimant's permanent functional impairment?

C. Did claimant have any permanent restrictions for her back injury?

D. What is claimant's task loss?

E. Is claimant entitled to work disability based upon a wage loss, even if she sustained no task loss?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The parties do not dispute that on October 7, 2009, claimant injured her right foot while folding up a rolltainer, which is a cart used to carry merchandise. Claimant testified the rolltainer weighed 300 pounds and fell on her right foot. Respondent authorized Dr. Pat D. Do to provide treatment for claimant's right foot injury. At the time of the accident, claimant was 31 years of age.

Claimant requested treatment for back pain, alleging it was caused by an antalgic gait that was caused by her right foot injury. Respondent refused to provide treatment. At a preliminary hearing held on January 5, 2010, claimant requested medical treatment for her back condition. Claimant testified at the preliminary hearing that after the accident, she was placed in a CAM boot around October 15, 2009. After using the CAM boot for one to two weeks, claimant began having back pain, which she attributed to walking with the boot. ALJ Barnes on January 6, 2010, appointed Dr. Do to evaluate claimant's back. In a report dated January 21, 2010, and addressed to the ALJ, Dr. Do stated:

Whereas it is possible that wearing a cam walker can alter her gait and cause some back pain, I do not think within a reasonable degree of medical probability that it would cause the back pain. I see patients everyday of the week they come in with back pain with no injury. Even she states it could just be from her getting old. There is no injury.¹

Dr. Do did not testify, and only his January 21, 2010, report is in evidence.

On April 13, 2010, ALJ Barnes appointed Dr. Sandra Barrett to evaluate claimant for diagnosis, causation opinion and treatment recommendations, if any. Dr. Barrett evaluated claimant on May 20, 2010. In a report dated May 20, 2010, Dr. Barrett indicated Dr. Do determined claimant reached maximum medical improvement for her right foot injury on February 16, 2010, and released claimant without restrictions. Dr. Barrett indicated claimant's back condition was work related. Claimant was very clear that her symptoms started at the time of the injury and were exacerbated by her altered gait from using the CAM walker and crutches. Claimant also reported to Dr. Barrett that an earlier MRI of the right foot had revealed a hairline fracture. However, Dr. Barrett stated that Dr. Do's notes indicated that the x-rays and the MRI of the right foot revealed claimant had no fracture. Claimant was diagnosed by Dr. Barrett with status post work-related injury on October 7, 2009, with right ankle injury, and cervicothoracic and lumbar strains.

On June 10, 2010, after reviewing the independent medical evaluation (IME) reports of Drs. Do and Barrett, and the January 5, 2010, preliminary hearing exhibits, ALJ Barnes ordered Dr. Barrett to provide treatment for claimant's back.

¹ Do IME Report at 2.

Dr. Barrett conservatively treated claimant's back, which included physical therapy, until she reached maximum medical improvement on September 30, 2010. No treatment was provided by Dr. Barrett for claimant's right foot. Claimant was released by Dr. Barrett without restrictions. Dr. Barrett opined in a report dated April 5, 2011, that pursuant to the *Guides*,² claimant had no permanent impairment to the back. Dr. Barrett was not asked to give an opinion on whether claimant's right foot had a functional impairment or if claimant sustained any task loss.

At the request of her attorney, claimant was evaluated by Dr. Pedro A. Murati on November 8, 2010. He examined claimant, took a history and reviewed her medical records. Dr. Murati did not review any of claimant's radiological films. He opined claimant's right foot and back conditions were the result of her October 7, 2009, accident. His diagnoses were: right metatarsalgia, right plantar fasciitis, bilateral sacroiliac dysfunction and low back pain with signs and symptoms of radiculopathy.

Dr. Murati assigned claimant a number of different functional impairment ratings for her right foot, including assigning a separate functional impairment for each metatarsal. Dr. Murati indicated that claimant's right foot impairments combined for a 25 percent functional impairment to the right lower extremity. Dr. Murati indicated that he used Table 64 of the *Guides* to formulate his opinion. Claimant's 25 percent right lower extremity functional impairment converts to a 10 percent whole body functional impairment. Although he had no radiological films to review, Dr. Murati opined claimant had a right foot fracture that developed into a metatarsalgia, which is pain in the metatarsal heads.

Dr. Murati opined claimant was in DRE Lumbosacral Category III of the *Guides*, and that she had a 10 percent whole body functional impairment. Claimant's back and right lower extremity functional impairments combined for a 19 percent whole body impairment. Dr. Murati testified claimant had not received appropriate treatment for her back and needed an MRI. Dr. Murati assigned claimant permanent restrictions that need not be set forth here. Dr. Murati testified claimant could no longer perform 22 of the 24 job tasks she performed in the 15 years prior to her accident.³

In an April 22, 2011, Order, ALJ Barnes ordered claimant to be evaluated by Dr. Peter V. Bieri for rating purposes and restrictions, if any. Dr. Bieri examined claimant on June 14, 2011, and issued an IME report the same day. In his report, Dr. Bieri indicated claimant was released by Dr. Do on January 26, 2010, without restrictions regarding her right foot, and made no mention of any back pain. Dr. Bieri also stated that claimant was seen by Dr. Do on February 16, 2010, and no mention was made of low back pain.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Vocational expert Doug Lindahl determined that claimant performed 24 non-duplicative job tasks in the 15 years preceding her accident.

Dr. Do's February 16, 2010, notes also stated claimant had no complaints of foot pain and that she was released. Dr. Bieri reviewed physical therapy records from South Central Kansas Regional Medical Center of September 24, 2010, which note claimant had no back pain and had taken no pain medication prior to the visit.

Dr. Bieri opined claimant had a soft tissue injury to her right foot with the diagnosis being a contusion. Dr. Bieri stated in his report that claimant had persistent right metatarsalgia, with no confirmed fracture, and opined that based upon Table 68 of the *Guides*, claimant had a 3 percent functional impairment to the right lower extremity. Claimant had moderate tenderness to diffuse palpation on the medial plantar surface radiating to the right ankle. Dr. Bieri indicated claimant had a full range of motion in the right ankle and no significant swelling.

Dr. Bieri noted claimant reported a progressive onset of back pain that she attributed to gait abnormality, along with use of a boot and crutches. Dr. Bieri stated on page six of his IME report, "Diagnosis and treatment to date appear reasonable, appropriate and consistent."⁴ Dr. Bieri also stated on page six of his report, "I believe the claimant when she states she has persistent pain of her low back, and accept the causation statement issued by Dr. Barrett."⁵ Dr. Bieri found no visible or palpable spasms of the cervicothoracic or lumbar spine. Dr. Bieri placed claimant in DRE Lumbosacral Category II of the *Guides*, and opined she had a 5 percent whole body functional impairment. He agreed with Drs. Do and Barrett that claimant had no permanent restrictions.

At the regular hearing, claimant testified that following the accident, she was on crutches six to seven months and was in the CAM boot for about four months. Prior to October 7, 2009, claimant had no symptoms of back pain. Claimant testified that she continues to limp and her ability to walk is still affected. Claimant averred that she has pain in her right foot and entire back and activities, such as doing laundry and standing to do dishes, caused her pain. Claimant vacuums in a seated position. She testified that lifting a gallon of milk hurts and she can lift it only a short distance. Claimant related that due to right foot pain, she can stand for no more than 30 minutes and can walk no more than one hour. After walking an hour, claimant must sit at least 45 minutes before she can get up. At times, her foot goes numb, then hurts and then throbs. Claimant testified that she was taking Naproxen, Tramadol and Meloxicam for her pain.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

⁴ Bieri Depo., Resp. Ex. 2.

⁵ *Id.*

right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant has the burden of proving: (1) the nature and extent of her right foot injury and disability, (2) she sustained a back injury, (3) the nature and extent of her back injury and disability and (4) whether she sustained a work disability and, if so, the nature and extent of the work disability.

Ordering an IME by a neutral physician is often a useful tool, particularly when each party has a medical expert with differing opinions. By ordering three different physicians to perform IMEs, the ALJ caused confusion, considerable expense and delay. The ALJ, as the fact finder, and now the Board, must analyze and weigh divergent opinions of the three neutral physicians, and the opinions of Dr. Murati. In her Award, ALJ Barnes does not mention she ordered an IME with Dr. Do or that he opined claimant's back injury was not work related. The ALJ did not explain why she appointed Dr. Bieri to evaluate claimant for rating purposes when she had the prior opinions of Drs. Do and Barrett.

The Board gives credence to the opinion of Dr. Barrett concerning claimant's low back injury. Dr. Barrett opined claimant's cervicothoracic and lumbar strains did not result in a permanent impairment. The Board also would note that Dr. Do opined claimant's antalgic gait did not cause her back pain. The opinions of Drs. Bieri and Murati that claimant had a permanent functional impairment of the lumbar spine are based primarily upon the subjective complaints of claimant. Dr. Bieri testified claimant had no visible or palpable spasms of the lumbar spine. His report indicated that claimant had slight tenderness in the lumbar spine to diffuse palpation radiating into the right hip.

Dr. Murati's opinion that claimant has a permanent lumbar spine impairment is suspect. He testified claimant has objective findings of nerve compression in the back, but those objective findings are that she is missing both hamstring reflexes, has weak right toe extension and positive straight leg raises. He testified that claimant has not been treated appropriately for her back injury and an MRI is needed to see "what's going on in her back."⁶ Because Dr. Murati needed an MRI to see "what's going on" with claimant's back, it would be difficult for him to give an accurate opinion on whether claimant had a permanent impairment or the nature and extent of her disability. Simply put, the Board finds claimant's back injury did not result in a permanent impairment. The Award of the

⁶ Murati Depo. at 31.

ALJ which gives claimant a whole body functional impairment and a work disability for the low back is reversed.

With regard to claimant's right foot injury, the Board adopts Dr. Bieri's opinion and finds claimant has a 3 percent right lower extremity functional impairment at the level of the foot. He indicated claimant had a soft tissue right foot injury, a full range of right ankle motion, moderate tenderness and no significant swelling. Dr. Murati's opinion that claimant sustained a 25% right lower extremity functional impairment was based upon the mistaken premise that claimant fractured her right foot. Dr. Murati opined claimant had a separate functional impairment for each of her five right metatarsals. He incorrectly relied on Table 64 of the *Guides*, which is to be used to rate forefoot deformity where there is a metatarsal fracture.

CONCLUSION

1. Claimant failed to prove, as a result of the October 7, 2009, accident, that her low back injury resulted in a permanent impairment.

2. Claimant sustained a 3 percent right lower extremity functional impairment at the level of the foot.

3. As agreed by the parties, claimant should have been paid 14 weeks of temporary total disability payments for the period of July 6, 2010, through October 11, 2010, at the rate of \$129.70 per week or \$1,815.80, which resulted in an underpayment of \$189.70. The temporary total disability appears to have been paid during a time period when claimant was being treated for her back condition by Dr. Barrett.

4. The temporary total disability paid to claimant was for her back injury that resulted in no permanent impairment.

5. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the September 10, 2012, Award entered by ALJ Barnes as follows:

⁷ K.S.A. 2012 Supp. 44-555c(k).

Claimant is entitled to 14 weeks of temporary total disability benefits at the rate of \$129.70 per week in the amount of \$1,815.80.

Claimant is entitled to 3.75 weeks of permanent partial disability benefits at the rate of \$129.70 per week in the amount of \$486.38 for a 3% right lower extremity functional impairment at the level of the foot.

The total award is \$2,302.18, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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